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Supreme Court, U.S.
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No. 04-1441

IN THE

Supreme Court of the United States

JOHN M. MCCULLOUGH, SUPERINTENDENT; THOMAS W. CORBETT, JR., ATTORNEY GENERAL; PENNSYLVANIA BOARD OF PROBATION AND PAROLE

Petitioners

v.

ROBERT DEFOY,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONERS' REPLY BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI

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CASES **PAGE**

Coady v. Vaughn, 251 F.3d 48 (3rd Cir. 2001). 1

Pace v. Diguglielmo, ___ U.S. ___, 126 S.Ct. 1807 (April 27, 2005). 1

Rhines v. Weber, ___ U.S. ___, 125 S.Ct. 1528 (2005). 1, 2

Respondent misdirects a great deal of effort into attempting to explain why the Court of Appeals was correct in thinking that the Pennsylvania Supreme Court would ultimately refuse to hear his claims. The point of the petition, however, is not whether the Court of Appeals guessed right — something we may never know if its decision is left undisturbed — but whether it should have guessed at all. The Court of Appeals' action needlessly thwarts the primary role that, by statute, state courts are to play in resolving federal issues presented by habeas petitions.

Needlessly, because there were available two separate procedures by which the Court of Appeals, at no risk to respondent, could have allowed the state courts to decide whether to hear respondent's claim, and if so to rule on it. First, the Court of Appeals could have certified the question to the Pennsylvania Supreme Court — a procedure which the Court of Appeals successfully employed to resolve a similar question in an earlier habeas case, *see* Pet. App. 14a-15a (discussing *Coady v. Vaughn*, 251 F.3d 480 (3d Cir. 2001)), but which it failed even to consider this time.

Second, the Court of Appeals could have employed the "stay and abey" procedure while respondent pursued his claims in state court. As the Court recently discussed in *Pace v. Diguglielmo*, ___ U.S. ___, 126 S.Ct. 1807 (April 27, 2005), a federal court confronted with a habeas petition including claims which may be barred in state court on procedural grounds can "stay and abey" the doubtful claims, thus allowing the state courts to decide whether they will hear the claims, while at the same time preserving the petitioner's federal filing date for purposes of AEDPA's statute of limitation. Although the Court has emphasized that the "stay and abey" procedure should be used sparingly, *see Rhines v. Weber*, ___ U.S. ___, 125 S.Ct. 1528, 1535 (2005), the Court said in *Pace* that invoking the procedure would be justified where a habeas petitioner

was reasonably confused about whether a state filing would be timely. *Id.*, 125 S.Ct. at 1814. It would therefore seem that "stay and abey" could likewise have been invoked in this case where, in view of unsettled state law, the habeas petitioner is reasonably confused about whether a state remedy is available to him at all.

The course the Court of Appeals did choose was thus both harmful and unnecessary, and should be reviewed by the Court.

Respectfully submitted,

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